Supreme Court, U.S.
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NO. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TANA WOOD, Superintendent, Washington State Penitentiary,

Petitioner,

v.

MITCHELL E. RUPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Does a capital defendant's Eighth Amendment right to present mitigating evidence prohibit a state court from applying its rules of evidence to exclude unreliable polygraph evidence?

2. Is a polygraph examiner's opinion, that a state witness was deceptive during a polygraph examination, relevant mitigating evidence of the "circumstances of the offense"?

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 1

III. CONSTITUTIONAL AND STATUTORY . 1

IV. STATEMENT OF THE CASE 3

A. Facts Surrounding the Murders and the Investigation. 3

B. First Trial and Capital Sentencing Proceeding 4

C. Trial Court Hearing on the Yovetich Polygraph 6

D. First Appeal to the Washington Supreme Court 7

E. Second Capital Sentencing Proceeding and Appeal 9

F. Federal Habeas Corpus Proceedings . . . 9

V. REASONS FOR GRANTING THE WRIT 11

A. This Court Should Resolve the Conflict Among the Circuits Regarding the Applicability of State Evidence Rules Excluding Unreliable Evidence in a Capital Sentencing Hearing. 13

1. The Ninth Circuit's Decision Regarding the Applicability of State Rules of Evidence Conflicts With Decisions of the Fifth, Tenth, and Eleventh Circuits. 13

2. This Case Squarely Presents This Issue Because There is No Finding that the Polygraph Evidence in this Case is Reliable. 15

B. A Polygraph Examiner's Opinion that a Person was Deceptive in Answering Questions During an Examination is not Mitigating Evidence of the "Circumstances of the Offense." 23

VI. CONCLUSION 27

TABLE OF AUTHORITIES

Cases	Page
Alderman v. Zant, 22 F.3d 1541 (11th Cir.), *cert. denied*, 115 S. Ct. 673 (1994)	14, 19
Brady v. Maryland, 373 U.S. 83 (1963)	16
Brecht v. Abrahamson, 507 U.S. 619 (1993)	11, 13
Brown v. Darcy, 783 F.2d 1389 (9th Cir. 1986)	18
Chambers v. Mississippi, 410 U.S. 284 (1973)	19
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)	19
Eddings v. Oklahoma, 455 U.S. 104 (1982)	10, 11, 18
Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989)	14
Estelle v. McGuire, 502 U.S. 62 (1991)	22
Franklin v. Lynaugh, 487 U.S. 164 (1988)	23-25

Johnson v. Texas,
___ U.S. ___, 113 S. Ct. 2658 (1993) 18

Lockett v. Ohio,
438 U.S. 586 (1978) . . . . . 10, 11, 14, *passim*

Madden v. Collins,
18 F.3d 304, 306-08 (5th Cir. 1994),
cert. denied. 115 S. Ct. 1114 (1995) 14

Mak v. Blodgett,
970 F.2d 614 (9th Cir. 1992),
cert. denied, 507 U.S. 951 (1993) 10

McKoy v. North Carolina,
494 U.S. 433 (1990) 11, 15

Robinson v. Maynard,
829 F.2d 1501 (10th Cir. 1987), *appeal*
after remand, 930 F.2d 922 (10th Cir.),
and 943 F.2d 1216 (10th Cir.), *cert. denied*,
502 U.S. 970 (1991) 14

Romano v. Oklahoma,
___ U.S. ___, 114 S. Ct. 2004 (1994) 15, 22

Rupe v. Wood,
93 F.3d 1434 (9th Cir. 1996) . . . . . 1, 10-14, *passim*

Rupe v. Wood,
863 F. Supp. 1315 (W.D. Wash. 1994) . 1, 10, *passim*
Saffle v. Parks,
494 U.S. 484 (1990) 15

Skipper v. South Carolina,
476 U.S. 1 (1986) 10, 11, 13, 15, 18

Stano v. Dugger,
883 F.2d 900 (11th Cir. 1989) 19

State v. Bartholomew,
101 Wn.2d 631, 683 P.2d 1079 (1984) . 9, 12, 18, 22

State v. Renfro,
96 Wn.2d 902, 639 P.2d 737,
cert. denied, 459 U.S. 842 (1982) 12, 18, 21

State v. Rupe,
101 Wn.2d 664, 683 P.2d 571 (1984) 8, 9, *passim*

State v. Rupe,
108 Wn.2d 734, 743 P.2d 210 (1987),
cert. denied, 486 U.S. 1061 (1988) 9

State v. Wood,
84 Wn.2d 472, 527 P.2d 271 (1974) 21

State v. Young,
89 Wn.2d 613, 574 P.2d 1171,
cert. denied, 439 U.S. 870 (1978) 21

Teague v. Lane,
489 U.S. 288 (1989) 10, 13

Thompson v. Wainwright,
787 F.2d 1447 (11th Cir. 1986),
rev'd on other grounds en banc,
901 F.2d 898 (11th Cir. 1990) 18

United States v. Bowen,
857 F.2d 1337 (9th Cir. 1988) 18

United States v. Candoli,
870 F.2d 496 (9th Cir. 1989) 18

Wood v. Bartholomew,
__ U.S. __, 116 S. Ct. 7 (1995)
(*per curiam*) 16

Statutes & Regulations

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(a) 1

28 U.S.C. § 2254(d) (1996) 2

RCW 10.95.020 24

Other Authorities

Fed. R. Evid. 401 15

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 1434 (9th Cir. 1996) and appears at Appendix A. The opinion of the district court is reported at 863 F. Supp. 1315 (W.D. Wash. 1994).

II. JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

Title 28, Section 2254(d) of the United States Code[1] provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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[1]28 U.S.C. § 2254(d) (1996) is the codification of § 104(3) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, which President Clinton signed into law on April 24, 1996. The new § 2254(d) was not in effect at the time of the district court's decision in Rupe's case but was in effect at the time of the Ninth Circuit's decision.

IV. STATEMENT OF THE CASE

A. Facts Surrounding the Murders and the Investigation.

Respondent Mitchell E. Rupe was convicted and sentenced to death for the murders of Candace Hemmig and Twila Capron.[2] The two women were employed by Tumwater State Bank to staff a small branch office in a remote area of Olympia, Washington. On September 17, 1981, at 11:00 a.m., Michael Capron arrived at the bank to take his wife, Twila Capron, to lunch. He walked into the bank and approached the counter, spotting his wife and Candace Hemmig lying on the floor. Mr. Capron telephoned 911 for help. When medics and the police arrived on the scene, they determined that Candace was already dead and that Twila could not survive the apparent massive injuries to her brain. The police secured the area and began their investigation.

Inside the bank, police officers discovered Rupe's bloodstained checkbook lying open on the customer's side of the counter. During the next five days, Rupe was interviewed several times, both at the crime scene and at his place of employment. During these discussions, Rupe volunteered that his account with Tumwater State Bank was overdrawn. Rupe claimed that he went to the bank on September 16 and 17, 1981, to take care of the overdrafts, but was unable to do so because each time he forgot certain materials needed to resolve the problem. On September 20, 1981, Rupe went to the police station and prepared an indenti-kit sketch of an individual he claimed to have seen at the bank on the 17th.

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[2] The Washington Supreme Court summarized the facts of Rupe's crimes in *State v. Rupe*, 101 Wn.2d 664, 669-74, 683 P.2d 571 (1984).

On September 22, 1981, Rupe voluntarily went to the Olympia police station to speak to the police investigators about the crime. Officer Midthun informed Rupe of his belief that Rupe was either involved in the crimes or had knowledge of the crimes. After discussing the matter with Officer Midthun, Rupe admitted committing the crimes and later gave three confessions to police officers. Searches of his vehicle netted ammunition of the type used in the robbery/murders. Rupe was charged in Thurston County Superior Court with two counts of aggravated first degree murder and two counts of robbery.

B. First Trial and Capital Sentencing Proceeding

Rupe's trial began with jury selection on March 10, 1982. Monte Yovetich, a friend and fellow student of Rupe's, testified that on Tuesday, September 16, 1981, he accompanied Rupe to Olympia. Following a discussion about robbing the Tumwater State Bank, Yovetich dropped Rupe off near the bank and drove to Olympia Technical Community College. Rupe joined him there shortly afterward. Rupe confessed to Yovetich that he had gone into the bank with his gun with the intention of robbing it but was unable to do it. Yovetich next saw Rupe on September 17, 1981, between 11:00 a.m. and noon. He testified that Rupe told him that he had done it, that he had robbed the bank and put the gun, money and green satchel in Yovetich's garage.

According to Yovetich, he and Marlin Townsend looked for the gun and green satchel and put them in Townsend's car. Yovetich and Townsend drove to a remote location and hid the money and gun. They returned to their respective homes, but shortly thereafter, nervous about the other's honesty, they went to look for each other. When they met up, they retrieved the money and gun.

They then dropped the gun off at the home of a third friend, Skip (Carl) Grosskopf. From there they went to dinner and to Townsend's parents' house. While with Townsend's parents, they learned from the newspapers that two women had been shot during the robbery. They retrieved the gun from Grosskopf, took it to the Hartstene Island Bridge and threw it into the water. The remaining money was hidden a second time. Testimony by Townsend and Grosskopf generally confirmed this sequence of events. Both Yovetich and Townsend admitted that they took money from the bag. Only slightly over $2,100 of the $4,382 missing from the bank was eventually recovered.[3]

Rupe's confessions were admitted at trial. In addition, three of Rupe's friends testified that Rupe admitted involvement in the crimes. At trial Rupe elected to testify and denied robbing the bank. On cross-examination, Rupe admitted that he had discussed robbing the bank with Monte Yovetich and admitted that he had previously gone to the bank intending to rob it. Rupe testified, however, that on September 17, 1981, while transacting his own business, he saw Monte Yovetich pull into the bank's parking lot on a motorcycle and armed with Rupe's .357 Colt Trooper. Rupe stated that this frightened him, because he thought Yovetich was going to rob the bank. He alleged that he then got into his truck and drove away and that both tellers were alive when he left the bank. Rupe denied any involvement in the robberies or murders and claimed that he confessed because he felt responsible for Yovetich's actions, since Yovetich used his gun to commit the crime.

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[3]Yovetich and Townsend were charged and convicted in Mason County Superior Court of felony counts of rendering criminal assistance and possession of stolen property in connection with Rupe's crimes. Both of Rupe's juries were made aware of these facts.

The jury was instructed on two counts of first degree robbery and two counts of first degree aggravated murder. On April 29, 1982, after two days' deliberation, the jury returned a verdict of guilty on all counts. At the conclusion of the special sentencing proceeding, the same jury unanimously concluded that there were insufficient mitigating circumstances to merit leniency, and Rupe was sentenced to death.

C. Trial Court Hearing on the Yovetich Polygraph

Prior to the guilt phase of the trial, Rupe moved to introduce evidence regarding a polygraph examination of Monte Yovetich. The trial court conducted a hearing out of the presence of the jury regarding the admissibility of the Yovetich polygraph examination. Officer Midthun of the Olympia Police Department had conducted the polygraph examination as part of the investigation of the murders. Four relevant questions were posed to Yovetich: (1) "Did you participate in the robbery of the bank last Thursday?"; (2) "Did you lie about throwing the pistol of [sic] the Hartstene Island Bridge?"; (3) "Do you know where the rest of that stolen money is now?"; and (4) "Did you lie about being in Mason County when the bank was robbed?"

Yovetich's reactions during the polygraph examination indicated deception on his part. Officer Midthun explained, however, that an examiner cannot determine if the reactions were actually caused by Yovetich lying or by other factors. Officer Midthun testified that the conditions surrounding the Yovetich examination rendered the results unreliable. The trial court held the evidence was not admissible because Rupe had not established that the polygraph evidence was reliable.

Prior to the sentencing proceeding, Rupe again moved to admit evidence of the Yovetich polygraph examination. Defense counsel argued that "a mitigating circumstance, even though the jury has found [guilt] beyond a reasonable doubt, may be the existence of any doubt whatsoever." Rupe argued that the defense was not attempting to show that Rupe was just an accomplice, but that Yovetich committed the crimes single-handedly:

> [T]he defense was not that of an accomplice, but that Monte Yovetich did it. The fact he took it and flunked the polygraph goes to any doubt that the jury may have regardless of whether it reaches the level of reasonable doubt, and that is a mitigating circumstance that can be considered by the jury.

In other words, Rupe intended to play on any residual doubt the jury may have that Rupe was not involved in the murders. The trial court again held the polygraph evidence was not admissible.

D. First Appeal to the Washington Supreme Court

Rupe appealed to the Washington Supreme Court, arguing that the trial court improperly excluded the Yovetich polygraph evidence during the guilt phase and the penalty phase. The Washington Supreme Court rejected Rupe's polygraph claim, concluding that:

> The evidence offered by the defendant simply does not reach the minimal threshold of reliability necessary to its admission in a criminal proceeding. In addition to the questionable reliability of polygraph

examinations, the present polygraph examination has other trustworthiness problems. The polygraphist concluded, during the defendant's offer of proof, that he doubted the test's validity. He cited Monte Yovetich's lack of sleep, hostility to police and nervousness as factors which possibly affected the tests results.

> Moreover, the results of the polygraph examination were further undercut by subsequent events. The polygraph charts indicate that Yovetich was lying when he answered the following question: "Did you lie when you said you threw the gun off the Hartstene Island bridge?" In response to this question, Monte said "no". The polygraph results showed that Monte was lying when he answered this question, but subsequent events suggest that he was telling the truth. For instance, the gun was located precisely where Yovetich stated he had thrown it.

State v. Rupe, 101 Wn.2d 664, 690-91, 683 P.2d 571 (1984).

The Washington Supreme Court also held that the trial court properly excluded the polygraph evidence from the special sentencing proceeding. The court noted that while capital sentencing proceedings require more relaxed evidentiary rules regarding defense evidence, "we cannot go so far as to permit clearly unreliable evidence to be introduced." *Rupe*, 101 Wn.2d at 691. The Supreme Court held that "polygraph examinations will not be admitted in those limited cases where their trustworthiness is seriously in doubt." *Id.* (citing *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984)).

The Washington Supreme Court affirmed Rupe's conviction of two counts of aggravated first degree murder, but reversed his death sentence on the ground that the trial court had erroneously admitted evidence of Rupe's gun collection during the penalty phase of the trial. *Rupe*, 101 Wn.2d at 703-708 and 710-11. The case was remanded to the Thurston County Superior Court for a new special sentencing proceeding.

E. Second Capital Sentencing Proceeding and Appeal

The new jury impaneled for the second special sentencing proceeding unanimously determined that there were not sufficient mitigating circumstances to merit leniency, and Rupe was again sentenced to death. Yovetich testified at this second sentencing proceeding but Rupe did not attempt to introduce any evidence of the Yovetich polygraph examination. Rupe again appealed his death sentence on several different grounds but did not raise any issues concerning the Yovetich polygraph examination. The Washington Supreme Court upheld Rupe's death sentence, and this Court denied his petition for writ of certiorari. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988).

F. Federal Habeas Corpus Proceedings

In November of 1991, Rupe filed a petition for writ of habeas corpus with the district court. His petition raised, among other grounds, a claim that the state trial court erred by excluding evidence of the Monte Yovetich polygraph examination during the second special sentencing hearing. The district court granted Rupe's petition, holding that the state trial court's exclusion of the Yovetich polygraph evidence violated Rupe's right under the Eighth

Amendment to present mitigating evidence. *Rupe v. Wood*, 863 F. Supp. 1315, 1336-41 (W. D. Wash. 1994). The district court held that the Yovetich polygraph evidence was "mitigating" because "it raised doubts as to whether Yovetich, the State's chief witness, was credible, and tended to support Rupe's claim that Yovetich was involved to some greater degree in the crime." *Rupe*, 863 F. Supp. at 1337. The district court held that, under *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), the state's rules of evidence could not be applied to exclude the polygraph evidence on the ground that it was untrustworthy and unreliable. *Rupe*, 863 F. Supp. at 1338-39.[4]

The Court of Appeals for the Ninth Circuit affirmed the district court's grant of the writ, holding that due process and the Eighth Amendment compelled the admission of the Yovetich polygraph results at Rupe's sentencing hearing. *Rupe v. Wood*, 93 F.3d 1434, 1440-41 (9th Cir. 1996). The Ninth Circuit rejected Petitioner's argument under *Teague v. Lane*, 489 U.S. 288 (1989), that requiring the admission of polygraph evidence despite the state's rules of evidence was a new rule. *Rupe*, 93 F.3d at 1440-41. The court held that its decision in *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), as well as this Court's decisions in *Lockett*, *Eddings*, *Skipper*, and *McKoy v. North Carolina*,

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[4]In a separate opinion, the district court concluded that judicial hanging would be an unconstitutional method of executing Rupe because of Rupe's weight (approximately 410 pounds). *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994). The Ninth Circuit vacated as moot the district court's decision, however, in light of the fact that the Washington Legislature amended the state law to provide that a defendant under sentence of death will be executed by lethal injection unless he chooses to be hanged. *Rupe v. Wood*, 93 F.3d 1434, 1439 (9th Cir. 1996).

494 U.S. 433 (1990), precluded the application of state rules to exclude the polygraph result because it was relevant, mitigating evidence. *Rupe*, 93 F.3d at 1439-41. The court concluded that the Yovetich polygraph result implicated Yovetich in the crimes and therefore bore on Rupe's "relative culpability". *Id.* at 1441. The court further agreed that the exclusion of the polygraph evidence was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the evidence, had it been admitted, would probably have substantially influenced at least one of Rupe's jurors. *Id.*

V. REASONS FOR GRANTING THE WRIT

This case concerns the admissibility of polygraph evidence offered as mitigating evidence in the penalty phase of a capital trial. In *Lockett v. Ohio*, 438 U.S. 586 (1978), Chief Justice Burger, writing for a plurality of the Court, described two categories of mitigating evidence that a defendant has a right to admit during the sentencing phase of a capital trial:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (emphasis in original; footnotes omitted). Although the Court in *Lockett* held that a defendant is entitled to present mitigating evidence, the

Court did not purport to displace a state's rules of evidence.

In Washington, the general rule is that polygraph evidence is not admissible absent a stipulation by the parties, and even then the trial court may refuse to admit it. *State v. Renfro*, 96 Wn.2d 902, 906-07, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982). In the context of a capital trial the rules of evidence are somewhat relaxed regarding mitigating evidence, but polygraph evidence is still inadmissible during a capital sentencing proceeding if the evidence is untrustworthy or clearly unreliable. *State v. Rupe*, 101 Wn.2d 664, 691, 683 P.2d 571 (1984); *State v. Bartholomew*, 101 Wn.2d 631, 646, 683 P.2d 1079 (1984). In Rupe's case, the state trial court, after an evidentiary hearing, found that the Monte Yovetich polygraph examination was unreliable and excluded it from evidence. The Washington Supreme Court affirmed this ruling. Despite the fact that the polygraph was properly excluded under Washington rules of evidence, the district court and the Ninth Circuit held that the polygraph results must be admitted as mitigating evidence of the circumstances of Rupe's crime.

This case presents two important questions. First, whether the Eighth Amendment requires the admission of polygraph evidence properly excluded under a state's rules of evidence as unreliable. Second, even if a state's rules of evidence permit the admission of polygraph evidence, whether a polygraph examiner's opinion about the truthfulness of a witness constitutes mitigating evidence of the circumstances of a crime. These are important questions that require resolution by this Court.[5]

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[5]If the Court grants certiorari, Petitioner additionally intends to argue (1) that the Ninth Circuit's holding in *Rupe* constitutes the announcement and retroactive application of a new constitutional rule of criminal procedure, in violation of *Teague v. Lane*, 489 U.S. 288

A. This Court Should Resolve the Conflict Among the Circuits Regarding the Applicability of State Evidence Rules Excluding Unreliable Evidence in a Capital Sentencing Hearing.

1. The Ninth Circuit's Decision Regarding the Applicability of State Rules of Evidence Conflicts With Decisions of the Fifth, Tenth, and Eleventh Circuits.

This Court has not clearly established the circumstances under which a trial court in a capital sentencing hearing may exclude proffered evidence based on a state evidentiary rule. Indeed, *Skipper v. South Carolina*, 476 U.S. 1 (1986) specifically left unresolved the State's argument in that case that "*Eddings* does not displace reasonable state-law rules regarding the competency of testimony." *Skipper*, 476 U.S. at 5. The *Skipper* Court concluded "[t]he record does not, however, support the State's contention that the trial court's ruling was no more than an even-handed application of rules restricting the use of opinion testimony." *Id.* at 5-6. Thus, the *Skipper* Court left open the question whether the states' rules of evidence can be applied in an even-handed manner to preclude unreliable evidence offered by the defendant as "mitigating evidence."

Despite this lack of clear direction, the circuit courts have generally determined that state courts retain discretion to exclude as irrelevant or unreliable some types

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(1989) and its progeny, and (2) that the exclusion of the polygraph evidence in Rupe's case was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Both of these arguments were rejected by the Ninth Circuit. *See Rupe*, 93 F.3d at 1440-41.

of evidence offered by the defendant as "mitigating evidence". *See, e.g., Edwards v. Scroggy*, 849 F.2d 204, 212 (5th Cir. 1988) (state court properly excluded under hearsay rule statements Edwards had made to his mother and priest expressing his remorse and his desire to lead a productive life in prison), *cert. denied*, 489 U.S. 1059 (1989); *Robinson v. Maynard*, 829 F.2d 1501,1505 (10th Cir. 1987), *appeal after remand*, 930 F.2d 922 (10th Cir.), and 943 F.2d 1216, 1217-18 (10th Cir.) (state court properly excluded opinion testimony by the victim's family that the death penalty should not be imposed), *cert. denied*, 502 U.S. 970 (1991); *Madden v. Collins*, 18 F.3d 304, 306-08 (5th Cir. 1994) (evidence of defendant's personality disorder, learning disability and troubled childhood not directly linked to the crime is not relevant mitigating evidence), *cert. denied*. 115 S. Ct. 1114 (1995); *Alderman v. Zant*, 22 F.3d 1541, 1557 (11th Cir.) (state court properly excluded hearsay statements, offered by the defense as mitigating evidence, on the ground they lacked adequate assurances of trustworthiness), *cert. denied*, 115 S. Ct. 673 (1994).

Despite the general consensus of other circuits and in the absence of clear direction from this Court, the Ninth Circuit has now held that a state trial court must admit, as evidence of the "circumstances of the offense", the results of a polygraph examination of a state witness. *Rupe v. Wood*, 93 F.3d at 1440-41. The Ninth Circuit further held that state courts may not exclude such polygraph evidence even though the trial court found the evidence failed to meet a state law requirement for reliability. *Id.* The Ninth Circuit's ruling improperly stretches the meaning and purpose of the *Lockett* rule, conflicts with decisions of other circuits, and deprives the State of its right to exclude incompetent evidence.

"The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in

capital sentencing proceedings." *Romano v. Oklahoma*, ___ U.S. ___, ___, 114 S. Ct. 2004, 2011 (1994). Although *Lockett* places "clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made," *Saffle v. Parks*, 494 U.S. 484, 491 (1990), nothing in *Lockett* "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense." *Lockett*, 438 U.S. at 604 n.12. "[T]he States . . . retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance." *Skipper*, 476 U.S. at 11 (Powell, J., concurring); *see also McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (the meaning of relevance in the context of mitigating evidence is no different than that set out in Fed. R. Evid. 401).

2. This Case Squarely Presents This Issue Because There is No Finding that the Polygraph Evidence in this Case is Reliable.

Rupe's case is an appropriate vehicle for resolving the conflict among the circuits because there is no dispute about the reliability of the Yovetich polygraph evidence. The state trial court and the Washington Supreme Court both agreed that the Yovetich polygraph results were unreliable.[6] Assuming that the polygraph evidence in

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[6]The district court conducted an evidentiary hearing regarding Rupe's claim that trial counsel was ineffective for failing to obtain an expert witness with respect to the Yovetich polygraph evidence. *Rupe*, 863 F. Supp. at 1325-29. The district court, however, expressly declined to decide whether the polygraph result was reliable: "It is not this Court's task to determine whether the Yovetich polygraph results

Rupe's case could be deemed mitigating, the evidence was still properly excluded because of the unreliable nature of polygraph evidence in general, as well as the particular defects found in the Yovetich polygraph examination.

Courts have traditionally held that polygraph evidence is inadmissible if it is offered to prove the truth or falsity of the statements made by the subject during the course of the examination. In reviewing an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), this Court recently concluded that the prosecution need not disclose the results of a polygraph examination of a state witness. *Wood v. Bartholomew*, __ U.S. __, 116 S. Ct. 7 (1995) (*per curiam*). Although the examination in that case indicated deception, this Court held that disclosure of the results was not required because "the results of a polygraph examination of one of the witnesses -- is not 'evidence' at all." *Bartholomew*, 116 S. Ct. at 10.

Until its decision in *Rupe v. Wood*, the Ninth Circuit itself had similarly expressed an inhospitable view toward the admission of unstipulated polygraph evidence, a view shared by most American courts:

> We have found no United States Court of Appeals decision which has affirmed the admission of unstipulated polygraph evidence under the Federal Rules of Evidence, . . . or concluded that the refusal to admit polygraph evidence at trial was an abuse of discretion . . . . At least five other Courts of Appeal have held that unstipulated polygraph evidence is *per se* inadmissible. . . . Given the questionable reliability of

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were valid." *Id.* at 1328. Indeed, the district court agreed that "a strong case can be made for the proposition that it was unreliable given the circumstances under which the test was administered." *Id.* at 1340.

polygraph evidence and the great potential for prejudice from inaccurate polygraph evidence, we conclude that unstipulated polygraph evidence is inadmissible as technical or scientific evidence under Fed. R. Evid. 702 because it does not "assist the trier of fact to understand the evidence or to determine a fact in issue." . . .

> The overwhelming potential for prejudice when incorrect polygraph evidence is introduced to a jury also supports our conclusion that polygraph evidence is *per se* inadmissible. . . .
>
> The introduction of polygraph evidence also infringes on the jury's role in determining credibility. Our adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes. Allowing a polygraph expert to analyze responses to a series of questions and then testify that one side is telling the truth interferes with this function. . . . Polygraph evidence is different from other scientific evidence such as ballistics, fingerprints, or voice analysis, because it is an opinion regarding the ultimate issue before the jury, not just one issue in dispute. . . . Providing the jury with an all or nothing evaluation of credibility and then telling the jury that this evaluation has an eighty percent to ninety percent chance of being accurate if the polygraph was properly administered interferes with, rather than enhances, the deliberative process.

Brown v. Darcy, 783 F.2d 1389, 1394-97 (9th Cir. 1986) (citations and footnotes omitted). *See also United States v. Candoli*, 870 F.2d 496, 504 (9th Cir. 1989); *United States v. Bowen*, 857 F.2d 1337, 1341-42 (9th Cir. 1988).

The general rule in Washington is that polygraph evidence is inadmissible absent stipulation by the parties, and even with a stipulation the trial court may still refuse to admit the evidence if the court is not convinced that the examiner is qualified or that the test was conducted properly. *State v. Renfro*, 96 Wn.2d 902, 905-07, 639 P.2d 737 (1982). Although this evidence rule is relaxed in the context of the sentencing phase of a capital trial, polygraph evidence is still inadmissible if it is untrustworthy or clearly unreliable. *State v. Rupe*, 101 Wn.2d at 691; *State v. Bartholomew*, 101 Wn.2d 631, 646, 683 P.2d 571 (1984).

Despite the general consensus of the unreliability of polygraph evidence, the Ninth Circuit has read this Court's decisions in *Lockett*, *Eddings*, and *Skipper* as holding that States may not apply their rules of evidence to preclude the admission of polygraph evidence offered by the defense in a capital sentencing hearing. This decision is in error.

"*Lockett* and its progeny stand only for the proposition that a state may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson v. Texas*, ___ U.S. ___, ___, 113 S. Ct. 2658, 2666 (1993). "*Lockett* entitles a capital defendant to introduce all relevant mitigating evidence at sentencing, but does not require a state to abandon its rules of evidence concerning what is competent testimony." *Thompson v. Wainwright*, 787 F.2d 1447, 1458 (11th Cir. 1986), *rev'd on other grounds en banc*, 901 F.2d 898, 906 (11th Cir. 1990). "[A] trial judge still retains the discretion to exclude

irrelevant, nonprobative evidence." *Stano v. Dugger*, 883 F.2d 900, 909 (11th Cir. 1989) (citing *Lockett*, 438 U.S. at 604 n.12). As the Eleventh Circuit recently noted:

> It is generally true that a defendant must be permitted to introduce any mitigating evidence at the sentencing phase of a capital case if the evidence relates to the defendant's character, record or the circumstances of the particular offense. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). ***However, a judge still retains the discretion to exclude otherwise inadmissable [sic] evidence which it determines lack considerable assurances of trustworthiness.***

Alderman v. Zant, 22 F.3d 1541, 1557 (11th Cir.) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)) (emphasis added) (trial court properly excluded hearsay statements offered by the defense as mitigating evidence), *cert. denied*, 115 S. Ct. 673 (1994).

In reaching its decision, the Ninth Circuit agreed "that a trial court need not accept, for example, astrology, or other evidence of no demonstrated scientific validity." *Rupe v. Wood*, 93 F.3d at 1440 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). However, ignoring the fact that polygraph evidence has traditionally been considered scientifically invalid and unreliable as a matter of law, ignoring the fact that the polygraph examiner in this specific examination believed the test was invalid, and ignoring the fact that the Washington courts found this particular evidence to be unreliable, the Ninth Circuit held that the trial court was required to admit this polygraph evidence. In so doing, the

Ninth Circuit erroneously stated that the trial court never found Monte Yovetich's polygraph to be unreliable. *Rupe v. Wood*, 93 F.3d at 1439. Because the trial court found that Rupe failed to demonstrate the scientific validity of the Yovetich polygraph examination, the evidence was properly excluded.

Prior to trial, the trial court conducted a hearing on the admissibility of the Yovetich polygraph examination. Officer Midthun, the polygraph examiner, testified he questioned the validity of the examination. 7 REC 3747-3810. Officer Midthun testified that he had difficulty in establishing a rapport with Yovetich, that Yovetich was a less than desirable subject for an examination, and that Yovetich had just undergone a vigorous interrogation by police. 7 REC 3796-98. Officer Midthun testified that these factors can compromise the validity of a test. 7 REC 3798. Officer Midthun testified that a polygraph examiner could not distinguish between a person telling a lie and a person merely withholding information. 7 REC 3800. Officer Midthun also testified that, although the examination indicated Yovetich was deceptive in answering the question, "Did you lie about throwing the pistol of [sic] the Hartstene Island Bridge?", the pistol was found exactly where Yovetich said he threw it. 7 REC 3802. These factors caused Officer Midthun to doubt the validity of Yovetich's polygraph examination.

Following this hearing, the trial court found, "I have decided that matter that this case has not met the standard of proof to such a finding of reliability. The Court cannot admit it on that basis." 8 REC 3859. The trial court further found that, based on the evidence, it could not find the test to be reliable. 8 REC 3861-62.

In reviewing the trial court's decision, the Washington Supreme Court noted that polygraph examinations are generally inadmissible under Washington law in the absence of a stipulation. *State v. Rupe*, 101

Wn.2d at 690 (citing *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982); *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978); *State v. Wood*, 84 Wn.2d 472, 527 P.2d 271 (1974)). The Washington Supreme Court went on to hold:

> The evidence offered by the defendant simply does not reach the minimal threshold of reliability necessary to its admission in a criminal proceeding. In addition to the questionable reliability of polygraph examinations, the present polygraph examination has other trustworthiness problems. The polygraphist concluded, during defendant's offer of proof, that he doubted the test's validity. He cited Monte Yovetich's lack of sleep, hostility to the police and nervousness as factors which possibly affected the test results.
>
> Moreover, the results of the polygraph examination were further undercut by subsequent events. The polygraph charts indicate that Yovetich was lying when he answered the following question: "did you lie when you said you threw the gun off the Harstene Island bridge?" In response to this question, Monte said "No". The polygraph result showed that Monte was lying when he answered this question, but subsequent events suggest that he was telling the truth. For instance, the gun was located precisely where Yovetich stated he had thrown it. . .

> . . . Although we recognize that death sentencing proceedings involve interests that require more relaxed evidentiary rules when considering evidence in defendant's favor, we cannot go so far as to permit clearly unreliable evidence to be introduced.

State v. Rupe, 101 Wn.2d at 690-91.

To the extent the Ninth Circuit's decision in *Rupe* is based upon its view that the trial court in Rupe's case "had never found that Yovetich's polygraph was 'clearly unreliable,'" *Rupe*, 93 F.3d at 1439, that view is manifestly erroneous because the trial court in fact found the Yovetich polygraph result unreliable. To the extent that the Ninth Circuit merely disagrees with the Washington Supreme Court's application of *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) in Rupe's case, that disagreement is over a question of state evidentiary law, and federal habeas corpus is not an opportunity for fine tuning of a state's evidence rules. *Romano v. Oklahoma*, 114 S. Ct. 2004, 2011 (1994); *Estelle v. McGuire*, 502 U.S. 62, 67-78 (1991).

What is of more far-reaching impact, however, is the Ninth Circuit's holding that a polygraph examination result, found to be unreliable by the state's trial and appellate courts, must be admitted in a capital sentencing proceeding. Whatever may be said of the reliability of polygraph evidence in general, evidence of an unreliable polygraph cannot possibly serve to ensure a fair individualized sentence that is based upon an accurate assessment of the defendant's culpability. Although *Lockett* prescribes two categories of sentencing considerations for capital sentencing hearings, "*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988).

B. A Polygraph Examiner's Opinion that a Person was Deceptive in Answering Questions During an Examination is not Mitigating Evidence of the "Circumstances of the Offense."

Because a polygraph examiner's opinion that a witness may have been deceptive in a prior polygraph examination is simply not mitigating evidence of the "circumstances of the offense", the trial court in Rupe's case properly excluded the evidence. Unlike the situation in *Lockett*, the results of the polygraph examination in question do not prove that Rupe was "less culpable". In *Lockett*, the defendant was convicted not as the person who actually pulled the trigger, but as a principal who helped plan and carry out the robbery which eventually led to murder (Lockett was not even in the shop at the time of the murder). *Lockett*, 438 U.S. at 589-94. Lockett's sentence was invalid because Ohio law prohibited the sentencing judge from considering the established fact of Lockett's minor role in the offense, as well as the established fact of Lockett's lack of a specific intent to commit murder.

On the other hand, Rupe was convicted as the actual murderer, the person who, with premeditated intent to kill, pulled the trigger. *State v. Rupe*, 101 Wn.2d at 673-74; 9 REC 4580-85. The polygraph evidence could not have shown that Rupe had a less culpable role in the murders, because the jury had already determined that Rupe was the person who shot the bank tellers, and not merely a person who helped plan the robbery. Knowing this, Rupe attempted to use the polygraph examination not to show that he had a lesser role in the crime, but to play on the jurors' doubts as to whether Rupe had *any* role in the

crime.[7] Rupe expressly intended to use the polygraph examination to argue that Monte Yovetich, and not Rupe, committed the murders. In so doing, Rupe was improperly trying to play upon the jury's residual doubts.

The Ninth Circuit erroneously concluded that Rupe would use the polygraph examination to demonstrate Rupe's "relative culpability" and "the role Yovetich played in the crime." *Rupe v. Wood*, 93 F.3d at 1441; *see also Rupe v. Wood*, 863 F. Supp. at 1337. However, Rupe never offered the polygraph evidence for that purpose. Rupe offered it solely to exploit the possibility of "any doubt whatsoever" by the jury. Rupe made it clear that he was not relying on a theory that Rupe was merely less involved in the crime relative to Yovetich: "the defense was not that of an accomplice, but that Monte Yovetich did it."

The Eighth Amendment principle that capital sentencers must not be precluded from considering relevant mitigating factors "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of [the defendant's] 'character', 'record', or a 'circumstance of the offense'." *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (plurality). "Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to

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[7]Unlike other states, Washington law does not authorize a capital sentence for felony murder. Under Washington law, Rupe could not be convicted of aggravated murder unless the jury found Rupe had premeditated the murder. RCW 10.95.020. Consequently, Rupe could not have used the polygraph evidence to show, for example, that he merely helped plan the robbery without a specific intent to kill. At best, Rupe could have only shown that, with a premeditated intent to kill, he helped plan the robbery *and* the murders, but was not present when the killings occurred.

reconsideration by the sentencing body of lingering doubts about his guilt." *Franklin*, 487 U.S. at 187 (O'Connor, J., concurring).

Whatever may be said about the possible theories of admissibility the defense *could* have used, the only express purpose for which the defense actually offered the Yovetich polygraph was to have the jury reconsider Rupe's guilt, not his "relative culpability" with Yovetich. At all times, Rupe disclaimed any reliance on an accomplice theory, and Rupe testified that Yovetich committed the crime alone. Rupe cannot, on habeas corpus review, revise and reformulate the defense theory of admissibility and challenge the trial court's decision on a ground he never presented to the trial court. Because the Eighth Amendment does not allow a capital defendant to exploit the jury's residual doubt, the polygraph evidence was not mitigating evidence of the "circumstances of the offense".

Even assuming Rupe was trying to show he played a less culpable role (which was not possible because the jury had already rejected such a claim during the guilt phase proceeding), the polygraph evidence did not concern Rupe's culpability. Rather, the polygraph results merely showed the examiner's initial opinion that Monte Yovetich may have been "deceptive" in answering questions during the examination. The polygraph evidence did not even show that Yovetich participated in the actual murders.[8] Although the polygraph evidence might have reflected

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[8]The four relevant questions that Officer Midthun asked Yovetich were: (1) "Did you participate in the robbery of that bank last Thursday?"; (2) "Did you lie about throwing the pistol of [sic] the Hartstene Island Bridge?"; (3) "Do you know where the rest of that stolen money is now?"; and (4) "Did you lie about being in Mason County when that bank was robbed?" Yovetich was never asked whether he shot the bank tellers, whether he knew the tellers would be shot, or even whether he was physically present at the time of the crimes.

Yovetich's credibility, because the polygraph examination did not go to Rupe's culpability, it was not mitigating evidence of the "circumstances of the offense".[9]

* * * * * * * * * * * * * * * *

Contrary to the Ninth Circuit's views, the Eighth Amendment does not supersede state evidentiary rules and *Lockett* does not prohibit state courts from excluding unreliable polygraph evidence. This Court should grant certiorari and use this case as an opportunity to clarify whether, and to what extent, a state's rules of evidence may be applied in a capital sentencing proceeding and to resolve the conflict among the circuit courts on this question. The Court should also use this case as a vehicle for defining what types of evidence fall within the "circumstances of the offense" category of *Lockett*.

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[9]The Ninth Circuit held the polygraph examination was also "mitigating" because it raised doubts as to Yovetich's credibility as a witness. *Rupe v. Wood*, 93 F.3d at 1441; *Rupe v. Wood*, 863 F. Supp. at 1337. However, evidence of a witness' credibility does not concern the defendant's character, prior record, or the circumstances of his offense. It concerns only the "character" of a witness. Because the Ninth Circuit improperly expands the definition of "relevant mitigating evidence," the Ninth Circuit's decision conflicts with the decisions of this Court and the other circuits.

VI. CONCLUSION

For the reasons stated above, Petitioner respectfully prays that this Court grant certiorari and reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-99013
94-99014

D.C. No. CV-91-01635-TSZ

OPINION

MITCHELL EDWARD RUPE,

Petitioner-Appellee-Cross-Appellant,

v.

TANA WOOD, Superintendent,

Respondent-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
September 6, 1995 -- San Francisco, California

Filed August 15, 1996

Before: J. Clifford Wallace, Mary M. Schroeder and Harry Pregerson, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Criminal Law and Procedure/Capital Cases Evidence

The court of appeals affirmed a district court judgment. The court held, among other things, that the district court did not err in holding that the refusal to admit certain polygraph evidence at a penalty phase hearing violated the defendant's due process rights to have relevant, mitigating evidence concerning the circumstances of the crime presented to the jury deciding between a penalty of life or death.

Appellee Mitchell Rupe confessed to killing two bank tellers in the state of Washington. Rupe had been told by police officers that his polygraph results were causing them to question his credibility. He later recanted the confession. At trial, he testified that he and Monte Yovetich had previously gone to the bank to rob it and that he had seen Yovetich in the parking lot. Yovetich, who was the state's principal witness, denied involvement on the day of the shootings and testified that after the robbery, Rupe confessed to him. Yovetich said that he and a friend spent some of the money and then threw the murder

weapon under a bridge, which was where the police later recovered it. Before trial, Yovetich was administered a polygraph examination in which he denied participation in the robbery and denied lying about throwing Rupe's pistol under the bridge. The polygraph examiner originally determined that Yovetich was untruthful in the examination, but later testified that the data was not entirely reliable. The trial court refused Rupe's proffer of the Yovetich polygraph test during the guilt and penalty phases of the trial. Rupe was convicted of first degree murder and sentenced to death.

The Washington Supreme Court ordered a new penalty phase hearing because evidence of Rupe's gun collection had erroneously been presented to the jury. The Washington Supreme Court rejected Rupe's argument that the polygraph results should have been admitted at the guilt and penalty phases, resting its decision on the view that the polygraph results were too unreliable to merit consideration.

On remand, the second penalty jury also sentenced Rupe to death, and the Washington Supreme Court upheld the second sentence on appeal. As directed by Washington statute, the Washington Supreme Court conducted an independent statutory review of Rupe's sentence. The Washington Supreme Court upheld the sentence after that review. Rupe's restraint petitions were denied, as were his state habeas corpus petitions.

Rupe filed a federal habeas petition. The district court declined the disturb the underlying convictions but granted the writ and vacated the sentence on two grounds. The court ruled that Rupe would suffer cruel and unusual punishment in violation of the Eighth Amendment if he were put to death by hanging, because Rupe weighs over

400 pounds and the planned execution could decapitate him. The court also held that Rupe was entitled to a new penalty phase hearing because the jury should have been allowed to consider a polygraph test of Yovetich as mitigating evidence. The court denied all of Rupe's other challenges to the penalty and guilt phases. Appellant Tana Wood, the Superintendent of the Washington State Penitentiary, appealed. Rupe cross-appealed.

[1] At the time Rupe was sentenced to death, a Washington prisoner sentenced to death would be executed by hanging unless the prisoner chose to die by lethal injection. [2] Washington amended its law, reversing the prior presumption in favor of hanging. Under current Washington law, a prisoner sentenced to death will be executed by lethal injection unless the prisoner chooses to be hanged. Washington represented that if Rupe is executed, he will be executed in accordance with the new law. Therefore, dismissal of the portion of Wood's appeal relating to Rupe's hanging was warranted due to mootness. Vacatur of the concordant portion of the district court's opinion was also warranted.

[3] A Washington Supreme Court case recognizes that under controlling United States Supreme Court authority, relaxed standards govern the admission of mitigating evidence during the penalty phase of a death penalty trial. The case held that under those relaxed standards, mitigating polygraph evidence may be admitted under certain circumstances. [4] In this case, the trial court had never found that Yovetich's polygraph was "clearly unreliable." [5] Rupe was not required to reoffer the polygraph results in order to appeal the constitutionality of their exclusion. [6] The district court correctly held that Rupe may use evidence that shows he did not play as great a role in the offense as the prosecution would like the jury

to believe. In this case, Yovetich indisputably played some role in the offenses. In addition, Rupe argued to the jury that Yovetich could have played a larger role in the murders. The issue of relative culpability was before the jury. Since that is an appropriate mitigating factor, the Yovetich polygraph was relevant insofar as it had bearing on the question of what role Yovetich played in Rupe's crimes. The evidence was also relevant to the state's theory. The district court correctly ruled that that evidence was relevant.

[7] Rupe's contention that the Washington Supreme court misapplied Washington law and punished him for exhausting his direct appeals was without support.

[8] Given the vagaries of the polygraph examiner's statements to Rupe, it could not be concluded that Rupe's polygraph examiner overbore his will with improper threats or promises.

[9] The district court did not err in concluding that certain minimal presentation of gun collection evidence was not a violation of Rupe's due process rights.

COUNSEL

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OPINION

SCHROEDER, Circuit Judge:

This is an appeal by the Superintendent of the Washington State Penitentiary, Tana Wood, from a judgment of the district court granting a writ of habeas corpus to petitioner Mitchell Rupe. Rupe was convicted of first degree murder for the shooting deaths of two bank tellers and sentenced to death. The district court declined to disturb the underlying convictions but granted the writ and vacated the sentence on two grounds. First, it ruled that Rupe would suffer cruel and unusual punishment in violation of the Eighth Amendment if he were put to death by hanging, because Rupe weighs over 400 pounds and the planned execution could decapitate him. Second, the district court held that Rupe is entitled to a new penalty phase hearing, because the jury should have been allowed to consider a polygraph test of the state's chief witness as mitigating evidence. The polygraph test supports Rupe's theory that the witness, who was an accessory to Rupe's crimes, played a larger role than he admitted in the murders. The district court denied all of Rupe's other challenges to the penalty and guilt phases of his prosecution, and Rupe cross appeals.

We affirm the grant of a new penalty phase hearing so that the jury may consider the previously excluded polygraph evidence. We dismiss Wood's appeal and vacate the decision below as moot on the Eighth Amendment hanging issue because Washington law has changed. We

affirm the district court on all issues raised in Rupe's cross-appeal.

FACTS AND PROCEDURAL HISTORY

The facts and major contentions of both sides are thoroughly discussed in two published opinions of the Washington Supreme Court, *State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571 (1984)("*Rupe I*") and *State v. Rupe*, 108 Wash.2d 734, 743 P.2d 210 (1987)("*Rupe II*"), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2834 (1988), and two published opinions of the district court, *Rupe v. Wood*, 863 F.Supp. 1307 (W.D.Wash. 1994) and *Rupe v. Wood*, 863 F.Supp. 1315 (W.D.Wash. 1994). We summarize the background facts very briefly.

Rupe was convicted and sentenced to death for killing two bank tellers during a robbery of a Tumwater State Bank trailer branch in West Olympia, Washington. The robbery occurred in September of 1981, when Rupe was 27. The record reflects that Rupe had a productive career in the army until 1980 when he was honorably discharged because he was unable to meet new army weight standards. Following his discharge, Rupe's life became dysfunctional. *See generally Rupe II*, 108 Wash.2d at 780-82, 743 P.2d at 235-36 (dissenting opinion of Justice Pearson, discussing details of Rupe's civilian and military life).

The evidence against Rupe was strong. His victims, Candace Hemming and Twila Capron, were found at approximately 11:00 a.m. by Capron's husband. Hemming was dead and Capron did not survive massive brain injuries. Rupe's bloody checkbook was found on the bank counter, and Rupe himself approached an investigating officer at approximately 11:40 a.m. and told the officer that he had been in the bank that morning. After several interviews over the next few days, Rupe confessed, having been told by police officers that his polygraph results were causing them to question his credibility.

Rupe later recanted his confession. At trial he testified that two days before the actual robbery, he and his friend, Monte Yovetich, had gone to the bank to rob it, but Rupe could not go through with the plan. Rupe testified he had returned to the bank the day of the robbery to take care of an overdrawn account, and on his way out he saw Yovetich in the parking lot with a green satchel. Rupe testified he was concerned that Yovetich would rob the bank, because Rupe had lent his pistol, in the green satchel, to Yovetich two days before. Rupe explained that his confession stemmed from guilt for having planned the robbery, and a feeling of responsibility for the gun.

The state's principal witness was Yovetich. Yovetich admitted that he and Rupe had discussed robbing the bank, but Yovetich denied any involvement on the day of the shootings. Yovetich testified that after the robbery, Rupe confessed to him. According to Yovetich, Rupe robbed the bank and then stashed the green satchel with the money and the murder weapon in Yovetich's garage. Yovetich said that he and a friend spent some of the money and then threw the murder weapon under a bridge, which is where the police later recovered it.

Before trial, Yovetich was administered a polygraph examination in which he denied participation in the robbery and denied lying about throwing Rupe's pistol under the bridge. The polygraph examiner originally determined that Yovetich was untruthful in the examination, but later testified that the data was not entirely reliable because of Yovetich's nervousness, lack of sleep and hostility toward police.

The trial court refused Rupe's proffer of the Yovetich polygraph test during both the guilt and penalty phases of the trial. At that time, Washington state law disfavored admitting polygraph results into evidence absent a stipulation. *State v. Renfro*, 96 Wash.2d 902, 639 P.2d 737, *cert. denied*, 459 U.S. 842, 103 S.Ct. 94 (1982).

In Rupe's initial appeal to the Washington Supreme Court, the court affirmed his conviction, but ordered a new penalty phase hearing because evidence of Rupe's gun collection had erroneously been presented to the jury. *Rupe I*, 101 Wash.2d at 703, 683 P.2d at 594. The Washington Supreme Court rejected Rupe's argument that the polygraph results should have been admitted at both the guilt and penalty phases, resting its decision on the view that the polygraph results were too unreliable to merit consideration:

> The [polygraph] evidence offered by the defendant simply does not reach the minimal threshold of reliability necessary to its admission in a criminal proceeding.

Id. at 690, 683 P.2d at 588.

On remand, the second penalty jury also sentenced Rupe to death, and the Washington Supreme Court upheld the second sentence on appeal. The Washington Supreme Court then conducted an independent statutory review of Rupe's sentence, as directed by Washington statute, RCW 10.95.100, and upheld the sentence after that review as well. Rupe's subsequent restraint petitions were similarly denied, as were his state habeas corpus petitions.

Rupe filed his federal habeas petition in 1990. The district court entered its judgment in September of 1994.

I. *The State's Appeal.*

A. Death by Hanging.

[1] At the time Rupe was sentenced to death, a Washington prisoner sentenced to death would be executed by hanging unless the prisoner chose to die by lethal injection. Rupe, unwilling to select the method of his death, challenged his potential execution by hanging as cruel and unusual punishment in violation of the Eighth Amendment. The district court agreed that hanging Rupe would constitute cruel and unusual punishment, 863 F.Supp. 1307 (W.D. Wash. 1994) and Wood appealed.

[2] After Wood's appeal was argued, Washington amended its law, reversing the prior presumption in favor of hanging. Under current Washington law, a prisoner sentenced to death will be executed by lethal injection, unless the prisoner chooses to be hanged. RCW 10.95.180 (effective June 6, 1996). Wood therefore moved to have the portion of her appeal relating to hanging Rupe dismissed as moot. In response, Rupe suggested that the new statute might not apply to him because he was originally sentenced under the old law. Washington

therefore affirmatively represented to this court that if Rupe is executed, he will be executed in accordance with the new law, stating that "Rupe will be executed by lethal injection, unless he elects judicial hanging or lethal injection is held to be invalid." Accordingly, we dismiss as moot the portion of Wood's appeal relating to Rupe's hanging, and vacate the concordant portion of the district court's opinion at 863 F.Supp. 1307.

B. The Polygraph Evidence.

Prior to Rupe's trial, Monti Yovetich, who was the state's key witness and an accessory to Rupe's crimes, took a polygraph examination. The polygraph examiner concluded that Yovetich was lying when he denied having anything to do with the killings. Rupe first proffered Yovetich's polygraph results during the guilt phase of his trial. At the time, Washington law excluded polygraph evidence unless all parties stipulated to its admissibility. *Renfro*, 96 Wash.2d 902, 639 P.2d 737. But, the Washington courts had also indicated that, given a strong enough showing that both modern polygraph technique and the particular polygraph results being proffered were reliable, they would consider deviating from the general rule barring polygraph evidence absent a stipulation. *Cf. State v. Pleasant*, 21 Wash.App. 177, 188-92, 583 P.2d 680, 687-88 (1978), *cert. denied*, 441 U.S. 935 (1979); *State v. Woo*, 84 Wash.2d 472, 475, 527 P.2d 271, 273 (1974). Thus, the trial court heard testimony on the reliability of polygraphs in general and Yovetich's in particular; it noted that Yovetich's test had the types of weaknesses that generally make courts skeptical of polygraphs, and declined to deviate from the general Washington rule barring polygraph evidence. Rupe proffered the Yovetich polygraph evidence again during the first penalty phase of his trial, but once more, apparently

for the same reasons, the trial court refused to admit it.

[3] Rupe challenged both exclusions on appeal. Two weeks before the Washington Supreme Court decided Rupe's case it decided *State v. Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079 (1984). *Bartholomew* recognizes that under controlling United States Supreme Court authority, relaxed standards govern the admission of mitigating evidence during the penalty phase of a death penalty trial. *Id.* at 645-46, 683 P.2d at 1088, (citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978)); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982). *Bartholomew* held that under these relaxed standards, mitigating polygraph evidence may be admitted if (1) the prosecution can cross-examine on the reliability of the results, and (2) the trial judge is convinced that the polygraph examiner was qualified and that the exam was conducted under proper conditions. *Id.* at 646, 683 P.2d at 1089.

When the Washington Supreme Court decided Rupe's case, it once again stated that more relaxed standards govern evidentiary rulings in the penalty phase, yet without further analysis or discussion of *Bartholomew*, it held that the Yovetich polygraph evidence was properly excluded because "we cannot go so far as to permit clearly unreliable evidence to be introduced." 101 Wash.2d 691, 683 P.2d 588.

[4] The trial court, however, had never found that Yovetich's polygraph was "clearly unreliable." The trial court record shows that although the examiner had doubts about the exam conditions, the examiner felt the tests were valid and conclusive when he first reviewed them.

The district court held that under the controlling

standards laid down by the United States Supreme Court, the polygraph evidence should have been admitted. The Supreme Court in *Lockett* stated that the jury,in considering whether to impose a death sentence, may not be precluded from considering any aspect of a defendant's character or record proffered as mitigating evidence:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604, 98 S.Ct. at 2964-65. The district court decided that exclusion of relevant evidence because of doubts about reliability violated the principle of *Lockett* and *Eddings* by interfering with the jury's ability to weigh mitigating factors. *See id.; Eddings*, 455 U.S. at 113-14, 102 S.Ct. at 876. We observe that a similar principle was emphasized in *McKoy v. North Carolina*, 494 U.S. 441, 110 S.Ct. 1227 (1990), where the Supreme Court struck down North Carolina's rule that a jury may only consider those mitigating factors found unanimously, explaining that "the State [can not] save the unanimity requirement by characterizing it as a standard of proof intended to ensure the reliability of mitigating evidence." *McKoy*, 494 U.S. at 443, 110 S.Ct. at 1233.

Here, the district court reasoned that there may be cases where potentially mitigating evidence can be excluded on reliability grounds, provided that the proffered evidence is so unreliable that it has no probative value at all; but, the

district court concluded that this was not such a case. *Rupe v. Wood*, 863 F.Supp. at 1341 n.22. In so holding, the district court also relied upon our own decision in *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S. Ct. 1363 (1993), where we said that a court can exclude evidence at the penalty phase if it is irrelevant, but cannot preclude "any relevant mitigating evidence." 970 F.2d at 623, (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671 (1986)).

We review *de novo* the district court's holding that, under the Eighth and Fourteenth Amendments, the Yovetich polygraph was wrongly excluded. *Campbell*, 18 F.3d at 681.

[5] In her appeal, Wood first argues that Rupe waived any objection to the exclusion of Yovetich's polygraph by failing to reoffer the polygraph results at his second penalty phase hearing. 863 F. Supp. at 1352 *See Jeffers v. Lewis*, 38 F.3d 411, 418 n.2 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1709, 131 L.Ed.2d 570 (1995) (no constitutional violation for failing to consider mitigating circumstance that defendant neglects to argue). *Id.* We agree with the district court, however, that after *Rupe I* had held the Yovetich polygraph evidence inadmissible, any attempt to reoffer those polygraph results would have been futile. *Id.* The trial court would have considered itself bound to exclude the polygraph as unreliable under *Rupe I*, and could not have reconsidered the polygraph evidence under the relaxed standards delineated in *Bartholomew*, a case that *Rupe I* postdates. *Id.* Thus, Rupe was not required to reoffer the polygraph results in order to appeal the constitutionality of their exclusion. *Id.* *See R.B. Matthews, Inc. v. Transamerica Transp. Serv., Inc.*, 945 F.2d 269, 272 n.2 (9th Cir. 1991) (failure to make offer of proof excused where it would be redundant, unnecessary,

or futile).

Wood next argues that the district court, in holding that the Yovetich polygraph was wrongly excluded, announced a sweeping new rule requiring the admission of all mitigation evidence, no matter how unreliable. Wood contends that this rule is unsupported by the governing precedents and that applying it in Rupe's case would violate the principles announced by the Supreme Court in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). Wood's position, however, mischaracterizes the district court's holding. The district court did not hold that all mitigating evidence, regardless of reliability, must be admitted. Rather, it acknowledged that wholly unreliable evidence may be excluded. We agree with Wood that a trial court need not accept, for example, astrology, or other evidence of no demonstrated scientific validity. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). But the district court's decision expressly authorizes exclusion of such completely untrustworthy evidence. 863 F.Supp. at 1341 n.22.

Nor did the district court announce any "new rule" not recognized as generally applicable at the time of Rupe's trial and hence not applicable in habeas proceedings. *See Teague v. Lane*, 489 U.S. at 305-310, 109 S.Ct. at 1073-1075. The district court endeavored, faithfully and successfully, to follow earlier announced constitutional standards of general applicability stemming from *Lockett* and *Eddings*. *See, e.g., Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079.

Wood's other principal contention on appeal is that Rupe offered the Yovetich polygraph only to show that Yovetich, rather than Rupe, killed the victims and that the polygraph was thus offered only to exploit the jury's

"lingering doubt" about Rupe's guilt. Wood argues that under *Franklin v. Lynaugh*, 487 U.S. 164, 172-74, 108 S.Ct. 2320, 2327 (1988), lingering doubt is not a relevant mitigating factor. *Id.* at 1473 (explaining that lingering doubts are not germane to mitigation because they are "not over any aspect of petitioner's 'character,' 'record' or a 'circumstance of the offense'").

[6] The district court agreed with Wood that Rupe should not be allowed to use the Yovetich polygraph in the penalty phase solely to play on the jury's lingering doubts about Rupe's guilt. But the district court correctly held that Rupe may use evidence that shows he did not play as great a role in the offense as the prosecution would like the jury to believe. *See generally Mak*, 970 F.2d at 623. Here, Yovetich indisputably played some role in the offenses, for he disposed of the murder weapon after the robbery and spent some of the robbery proceeds. Furthermore, Rupe did argue to the jury that Yovetich could have played a larger role in the murders. Therefore, the issue of relative culpability was before the jury. Since relative culpability is an appropriate mitigating factor, the Yovetich polygraph is relevant insofar as it bears on the question of what role Yovetich truly played in Rupe's crimes. *Id.* The evidence was also relevant to the state's theory, for the prosecutor argued to the jury that Yovetich told the truth to the police and that "there is not one shred of evidence other than Mr. Rupe's statement that Mr. Yovetich did it." The polygraph results would have refuted that assertion. Thus, we conclude that the district court correctly ruled the evidence was relevant.

Finally, the state argues that if there was error in the failure to admit the evidence, the error was harmless. The district court, in a post-trial order, expressly ruled that under the standards of *Brecht v. Abrahamson*, 507 U.S.

619, 113 S.Ct. 1710 (1993), the petitioner met his burden of showing that the exclusion of the polygraph evidence had a substantial and injurious effect on the verdict because there is a reasonable probability that, had the evidence been admitted, it would have substantially influenced at least one juror's balancing of aggravating and mitigating factors." We agree. There was a clear issue of relative credibility, as well as culpability, as between Rupe and Yovetich. The lack of the polygraph evidence enabled the prosecutor to impugn, persuasively, Rupe's credibility before the jury. There was, in addition, substantial mitigating evidence through many witnesses. *See generally Rupe II*, 108 Wash.2d at 780-82, 743 P.2d at 235-36 (dissenting opinion of Justice Pearson, discussing evidence in mitigation).

[7] We therefore affirm the district court's holding that the refusal to admit the polygraph evidence at the second penalty phase hearing violated Rupe's due process rights to have relevant, mitigating evidence concerning the circumstances of the crime presented to the jury deciding between a penalty of life or death.

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II. *The Rupe Cross-Appeal.*

A. Washington's Statutory Death Penalty Review.

The Washington Supreme Court is required to conduct an independent statutory review of all Washington death sentences. RCW 10.95.100.[1] It must determine whether (1) sufficient evidence supports the jury's finding that mitigating factors do not merit leniency, (2) death is proportionate to punishments imposed in similar cases, and (3) the sentence is the product of passion or prejudice.

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[1] 10.95.100

> Mandatory review of death sentence by supreme court -- Notice -- Transmittal -- Contents of notice -- Jurisdiction
>
> Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.
>
> Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

RCW 10.95.130.[2] If the answer to any of these questions

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[2]10.95.130

Questions posed for determination by supreme court in death sentence review -- Review in addition to appeal -- Consolidation of review and appeal

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports of Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice; and

(d) Whether the defendant was mentally retarded within the meaning of RCW 10.95.030(2).

undermines the validity of the death penalty, then, pursuant to RCW 10.95.140,[3] the Washington Supreme Court must invalidate the death sentence and remand for resentencing.

Rupe argues that the Washington Supreme Court violated the scheme by failing to conduct a statutory review, to determine whether Rupe's sentence was the product of "passion or prejudice," before it remanded for

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[3]10.95.140

> Invalidation of sentence, remand for resentencing -- Affirmation of sentence, remand for execution
>
> Upon completion of a sentence review:
>
> (1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:
>
> (a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or
>
> (b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2)(b), (c), or (d).
>
> (2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:
>
> (a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and
>
> (b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2)(b), (c), and (d).

a new penalty phase trial in *Rupe I*. Rupe argues that this alleged violation of Washington law effectively punished him for exercising his right to appeal and thereby deprived him of federal due process rights. Specifically, Rupe contends that if he had forgone his direct appeal in *Rupe I*, the court would have (1) done the "passion or prejudice" review, and (2) found that Rupe's sentence was the product of "passion or prejudice" because the jury heard wrongly admitted evidence about Rupe's gun collection. Under Rupe's theory of Washington law, the court would then have been required to commute Rupe's death sentence to life imprisonment.

The district court, however, disagreed and explained that under Washington law, the Washington Supreme Court is not required to commute a sentence to life just because the sentence is the product of "passion or prejudice." The Washington Supreme Court may remand for a new penalty phase trial if another hearing could cure the "passion or prejudice." Further, Rupe received a new penalty phase trial, as the result of the wrongfully admitted gun evidence, following his direct appeal in *Rupe I*. Thus, Rupe would not have been better off had he forgone his direct appeal.

The district court's view of Washington law is correct. The Washington Supreme Court has explained that when it remanded for a new penalty phase trial in *Rupe I*, it was not permitted, under Washington law, to commute Rupe's sentence to life. Order of November 3, 1992. Rather, Washington's statutes only allow the Supreme Court to commute a sentence to life when no further legal proceedings are available:

> If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of

> a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was [a death sentence] shall be life imprisonment as provided in RCW 10.95.030(1).

RCW 10.95.090. This reasoning would have applied even if the Washington Supreme Court had done a statutory review in *Rupe I*. A sentence that is found to be the product of "passion or prejudice" because of a garden variety evidentiary error should not be commuted to life imprisonment if a further proceeding could cure that error. Rupe's contention that the Washington Supreme Court misapplied Washington law and punished Rupe for exhausting his direct appeals is without support.

B. Constitutionality of the Statutory Review.

Washington's statutory review scheme requires the supreme court to decide, *inter alia*, whether any given death sentence is "disproportionate to the penalty imposed in similar cases." *See* RCW 10.95.130(2)(b). Rupe maintains that meaningful proportionality review under this scheme is foreclosed because there are no adequate definitions for "similar cases" or "disproportionate." These shortcomings, concludes Rupe, relying on *Harris ex rel. Ramseyer v. Blodgett*, 853 F.Supp. 1239 (W.D. Wash. 1994)(Bryan, J.), *aff'd*, 64 F.3d 1432 (9th Cir. 1995), violate his due process rights.

The *Harris* case, however, was a fact-specific ruling. The court there identified at least five problems that Harris faced because of the proportionality review statute. Those problems do not appear in this record. First, in *Harris* the majority of the Washington Supreme Court was not able to find any cases that it considered similar to Harris', *Harris*, 853 F.Supp. at 1288, and the statutory scheme did not give an alternative procedure for review when no similar cases were found. *Id.* at 1289. Thus, the statute gave "little guidance" in *Harris*. *Id.* at 1288. Neither of these problems was an issue in *Rupe II*, as the majority found that eight cases were similar to Rupe's. In *Harris* some of the Washington Supreme Court's statements "amount[ed] to findings of fact," yet the review statute created no mechanism for the court to resolve disputed factual issues. *Id.* at 1290. Here, Rupe has not argued that the Washington Supreme Court engaged in any fact finding. Nor has Rupe developed the record to show that he lacked notice of what types of cases the court would consider, which was another factor in the *Harris* case. *Id.* at 1289. Moreover, in Rupe's case, the majority and the dissent both selected "similar" cases based on whether the cases had aggravating factors in common with Rupe's case, and thus the majority and the dissent focused in the main on the same cases. 108 Wn.2d at 766-71, 786-88, 743 P.2d at 228-30, 238-39. Given the record in this case, we decline to find that the review was so inadequate that Rupe was essentially deprived of any review, and due process will not recognize a less egregious injury. *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992), *cert. denied*, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994).

Rupe also argues that Wood is collaterally estopped from defending the proportionality review scheme because Washington did not appeal the part of the *Harris* decision holding that Harris' proportionality review violated his due

process rights. Because the *Harris* decision was intimately tied to the facts in that case, Rupe's collateral estoppel argument must also fail.

C. Voluntariness of Confession.

Rupe maintains that his confessions to the police were involuntary because his will was overborne by the officer who administered his polygraph exam. *See Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 449 (1985) (whether confession was voluntary turns on whether defendant's will was in fact overborne). The record shows that the examiner spoke at length to Rupe after Rupe had voluntarily taken the polygraph examination. The examiner told Rupe he appeared to have failed the exam and would be better off if he cooperated rather than having the examiner report the results to the investigatory officers. The examiner suggested he could conduct more polygraph tests that might help if Rupe cooperated. Rupe argues that the examiner's statements constituted improper threats and promises.

[8] The question of the voluntariness of a confession is a legal issue that requires an independent federal determination. *Id.* at 110, 106 S.Ct. at 449 (1985). The Washington Supreme Court examined the challenged statements in context and concluded there were no threats or promises, but merely "psychological appeals to defendant's conscience." *Rupe I*, 101 Wash.2d at 679, 683 P.2d at 582. This was essentially a factual conclusion, which is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Miller*, 474 U.S. at 117, 106 S.Ct. at 453 (subsidiary questions, such as the length of the interrogation or defendant's prior experience with the legal system, are factual matters on which we defer to the state court). Given the vagaries of the examiner's statements to

Rupe, we cannot conclude that Rupe's polygraph examiner overbore his will with improper threats or promises. The district court was correct when it held that Rupe's confession was voluntary.

D. Admission of the Gun Collection Evidence

At Rupe's first penalty phase trial, evidence of Rupe's gun collection was improperly admitted. *Rupe I*, 101 Wash.2d at 703, 683 P.2d at 594. Further, the evidence spanned some 25 pages of the trial transcript and was "the crux of the prosecution's argument to the jury for the defendant's death." *Id.* at 708, 683 P.2d at 571. Thus, the Washington Supreme Court remanded for a second penalty phase hearing. At that second hearing a prosecution witness twice mentioned several of Rupe's guns, once when the witness was describing the contents of Rupe's car, and once when the witness listed the firearms Rupe admitted to owning.

Wood conceded, before the district court, that this gun collection testimony was inadmissible under *Rupe I*, and thus violated state law. *Rupe v. Wood*, 863 F.Supp. at 1344. Nevertheless, the district court found that the limited admission of the gun collection evidence at the second penalty phase trial did not "so fatally infect[ ] the proceedings as to render them fundamentally unfair," *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991), and thus the evidence did not violate Rupe's due process rights. 863 F.Supp. at 1347. In so holding, the district court noted that (1) the improper testimony lasted only a few moments and did not describe the guns beyond naming them, (2) the gun testimony was embedded in longer testimony on other subjects, (3) the prosecutor did not call attention to the improper testimony at the time it was offered or in closing, nor did the prosecution portray

Rupe as a "commando" as it did in the first hearing, (4) the other evidence against Rupe was weighty, and (5) Rupe himself had offered evidence of his interest in guns in mitigation. *Id.* at 1345-46.

[9] We hold that under these circumstances, the district court did not err in concluding that this minimal presentation of gun collection evidence was not a violation of Rupe's due process rights.

E. Ineffective Assistance of Counsel.

Rupe next argues that he received ineffective assistance of counsel at both is penalty phase retrial and on appeal. He points to three shortcomings of his counsel at his second penalty phase trial. First, Rupe notes that his counsel did not object to prosecution testimony, discussed *supra*, about Rupe's gun collection. The district court correctly held that Rupe's counsel's failure to object to the gun collection evidence was deficient performance under *Strickland v. Washington*, 466 U.S. 668, 678, 687, 104 S. Ct. 2052, 2059-2060, 2064 (1984). But, to prevail on this claim, Rupe must also show that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069. As discussed above, the jury's exposure to the gun evidence was cursory, and we find no reasonable probability that it bore on any juror's decision to sentence Rupe to death. The district court was correct to reject this claim.

Second, Rupe argues that his counsel should have found an expert to testify to the reliability of Yovetich's polygraph, and then should have made another attempt to admit the polygraph at the second penalty phase trial. The

district court found that in light of the holding in *Rupe I* that the polygraph was "clearly unreliable," and the trial court's indication that it would follow that holding, the decision by Rupe's counsel not to pursue the issue was not deficient performance. 863 F.Supp. at 1328-1329. As we held, *supra*, any attempt to reoffer the Yovetich polygraph after *Rupe I* would have been futile. Because the failure to take a futile action can never be deficient performance, the district court was correct to reject this claim.

Third, Rupe argues that he received ineffective assistance of counsel when his attorney failed to take remedial action in response to the prosecution's improper cross examination of Rupe. The prosecution questioned Rupe on his supposed confession to another death row inmate, but never produced the inmate to verify Rupe's statements, which is improper under Washington law. *See State v. Babich*, 68 Wash.App. 438, 842 P.2d 1053 (1993). Rupe's counsel, however, testified that he did not believe the questions were harmful to Rupe. 863 F.Supp. at 1131. Thus, the district court found that Rupe's counsel's failure to take curative action was within the reasonable range of professional assistance. 863 F.Supp. at 1330. We agree.

Finally, Rupe contends that he received ineffective assistance of counsel on appeal. Such claims are also reviewed under the *Strickland* standard. *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). Rupe argues that because the Washington Supreme Court had once reversed because of the improper admission of gun collection evidence, his attorney erred by not raising the issue for a second time in *Rupe II*. The district court, correctly, agreed. But, the district court found that "Rupe was not prejudiced by his counsel's failure to raise the gun issue on appeal because there is no reasonable probability that Rupe would have prevailed on the issue had it been raised." 863

F.Supp. at 1332. We agree with the district court. The jury's cursory exposure to evidence of Rupe's other guns would not, in all probability, be enough for the Washington Supreme Court to find that Rupe was prejudiced and reverse for a third penalty phase hearing.

F. Cumulative Error.

Finally, Rupe contends that the numerous errors discussed above resulted in cumulative error in the guilt phase of Rupe's trial. We agree with the district court, however, that there was no violation of federal rights in connection with the guilt phase of Rupe's trial. Thus, there is no reason to reverse for cumulative error.

AFFIRMED.